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No. 99-1273

IN THE

Supreme Court of the United States

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., WEST OF ENGLAND SHIPOWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG), CONTINENTAL INSURANCE COMPANY, THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, ASSURANCEFORENINGEN SKULD, LIVERPOOL & LONDON STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION LIMITED, AND MARINE OFFICE OF AMERICA CORP.,

Petitioners,

v.

UNITED STATES LINES, INC. AND UNITED STATES LINES (S.A.) INC. REORGANIZATION TRUST AND ASBESTOS CLAIMANTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

RICHARD H. BROWN, JR.
KIRLIN, CAMPBELL & KEATING
Attorneys for American Steamship Owners Mutual Protection and Indemnity Association, Inc.
Five Hanover Square
New York, NY 10004-2614
(212) 425-7800

JOHN D. KIMBALL
Counsel of Record
JEREMY J.O. HARWOOD
HEALY & BAILLIE, LLP
Attorneys for United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd.
29 Broadway
New York, NY 10006
(212) 943-3980

(Additional Counsel Listed on Signature Page)

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RESTATEMENT OF THE CASE

The two questions for which review by this Court is sought are both bright-line issues of fundamental importance. The Trust's attempt to show that they are fact intensive and *sui generis* is unfounded and an obvious effort at obfuscation. Most regrettably, some of the factual points emphasized by the Trust are plainly wrong.[1] But none of these factual inaccuracies affect the highly important issues we ask this Court to consider.

The "core issue" we ask the Court to review is of basic importance to bankruptcy law generally and has major implications which go far beyond this particular case. The Second Circuit's ruling is in direct conflict with this Court's decision in *Northern Pipeline Co. v. Marathon Pipe Line Co.*, ("*Northern Pipeline*"), 458 U.S. 50 (1982) and rulings of other circuits. The Second Circuit's decision could affect every bankruptcy case which involves alleged post-petition breaches of pre-petition contracts. The holding that such disputes are "core" and to be decided by the bankruptcy court is a major departure from the very clear direction this Court

1. For example, the Trust knows that MALC's claims do not involve an actual "mass tort." Indeed, in a very recent and important development, at a hearing in the bankruptcy court on February 29, 2000, Bankruptcy Judge Gonzalez announced that he will be entering an order on or about March 7, 2000 granting the Trustee's motion to expunge virtually all of MALC's asbestos claims. The Trust is also in error in referring to what it calls a "P & I policy dilemma" and an "insurance maze." The undisputed fact is that, with a single exception, at no time has the Trust made an actual indemnity claim against any of the insurers with respect to MALC's claims. The one exception was a claim which was settled by the Trust with the approval of the Clubs and for which the Trust was reimbursed by two of the Clubs.

set down in *Northern Pipeline*. Even the Trust recognizes the great importance of the "core" issue. Having lost in the District Court, the Trust succeeded in obtaining interlocutory review in the Second Circuit. Throughout, the Trust has been loud and clear in trumpeting the importance of the policy question raised.

The arbitration issue also involves a policy question of the first order of importance. The Second Circuit's ruling that a bankruptcy judge has discretion to annul an otherwise valid and enforceable foreign arbitration agreement is in direct conflict with prior decisions of this Court and of other circuit courts. For many years, this Court has steadily promoted arbitration, especially in international commercial agreements. The Second Circuit's decision undermines the policy of promoting arbitration and directly conflicts with the Treaty obligations of the United States.

I.

THERE IS A CLEAR AND SIGNIFICANT CONFLICT BETWEEN THE SECOND CIRCUIT DECISION ON CORE JURISDICTION AND THE DECISIONS OF THIS COURT AND MOST OF THE OTHER COURTS OF APPEALS. THE RELATED ASPECTS OF THE BANKRUPTCY CASE DESCRIBED BY THE TRUST ARE IRRELEVANT TO THE CORE JURISDICTION ISSUE OR, PROPERLY CONSIDERED, CONFIRM THAT THE MATTER IS NONCORE

On the first question presented for review, *i.e.*, whether a bankruptcy judge constitutionally has core jurisdiction to determine rights under pre-petition insurance contracts, the Trust largely relies on arguments which are both new and

peripheral to the question. While avoiding a straightforward acknowledgment that the Second Circuit decision herein is in conflict with this Court's teaching and the majority of the other circuits, the Trust advances an irrelevant detailed factual argument in an attempt to isolate the decision as being merely "*sui generis*" and hence unworthy of consideration. However, questions of jurisdiction always arise in different factual and procedural contexts. Surely, especially in light of existing authority, so fundamental a question as a court's constitutional jurisdiction should not depend to any great extent on a nice assessment of the sort of confusing and tangential considerations advanced by the Trust.

A. The Second Circuit Decision Is In Clear Conflict With The Teaching of *Northern Pipeline* And The Majority Of Other Circuit Courts

Acknowledging that *Northern Pipeline*, 458 U.S. at 71, describes "the restructuring of debtor-creditor relations" as being "at the core of the federal bankruptcy power," the Trust can do no more than claim that "[t]his case is thoroughly imbued with those public rights inherent in" such restructuring. T. Br. 11.[2] Whatever that vague and dubious assertion might mean, it cannot fairly be said that the insurance contract rights, independent of and antecedent to the reorganization petition, are, contrary to *Northern Pipeline*, transformed into public rights because the Trust seeks to enforce them. *See id.* at 71-72, 84. The Trust merely demonstrates that adjudication of those rights is related to the bankruptcy case, a point never disputed.

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2. References to the Trust's brief in opposition are "T. Br. __."Abbreviations are taken from the petition.

The Trust's predicament is emphasized by its subsequent litany of the adversary proceeding's "bankruptcy characteristics," employing only phrases indicating that the adversary proceeding is related to the bankruptcy case rather than actually being core under the terms of *Northern Pipeline*. Thus, the Trust mentions the proceeding's: "(i) concern for . . . (ii) impact upon . . . (iii) involvement with . . . (iv) specific inclusion in the contents of a plan of reorganization . . . (v) the inherent and necessary application of [bankruptcy statutes (always applicable in bankruptcy matters — core or noncore)] . . . ." T. Br. 12. Such references only make it clearer that the adversary proceeding is not "core" under *Northern Pipeline*, but a "related to" proceeding. *See* 28 U.S.C. § 157(a) (146a). The Trust's foregoing "related to" assertions are in keeping with the erroneous views of the Bankruptcy Court in basing its "core" decision only on a "strong *nexus* . . . between the . . . adversary proceeding and the general reorganizational process . . . ." T. Br. 12 and *USL I*, 107a (emphasis added). Judge Walker of the Second Circuit made the same error, stating ". . . the declaratory proceedings . . . directly *affect* the bankruptcy court's core administrative function . . . ," T. Br. 14 and *USL IV*, 12a (emphasis added), after his initial error of applying a test of whether the proceeding (rather than the contract right) is independent of the reorganization, *USL IV*, 8a, an error the Trust studiously avoids mentioning despite our emphasis of it. Petition, 8-9.

Clearly each of the Second Circuit's three opinions holding this matter core is also in conflict with the majority of the other circuits. The Trust does not seriously deny the conflict, and can only vaguely argue that the cases cited in the Petition "are not comparable to the subject decision in functional bankruptcy terms," Tr. Br. 19 n.21, an irrelevant consideration. The Trust cites only two circuit court cases

holding adversary proceedings core, purportedly illustrating "conflict on the methodology," *In re Arnold Print Works, Inc.*, 815 F.2d 165 (1st Cir. 1987) and *In re Ben Cooper, Inc.*, 896 F.2d 1394 (2d Cir. 1990), *vacated on other grounds*, 498 U.S. 964 (1990), *opinion reinstated*, 924 F.2d 36 (2d Cir. 1991), *cert. denied*, 500 U.S. 928 (1991). T. Br. 16 n.17. Both cases are inapplicable, as they concern contracts entered into post-petition by the debtor which were neither antecedent to nor independent of the petition, in sharp contrast to the pre-petition contracts here. Indeed, the Trust's citation of those cases starkly reveals the hollowness of its arguments.[3]

B. The Numerous Features Of This Bankruptcy Case Described By The Trust Are Extraneous To Or Easily Separable From This Adversary Proceeding And Do Not Render It Core

The Trust asserts that the Plan explicitly directs the Trust to litigate with a Club if it refuses to cover the Trust's exposure to asbestos claims, quoting an excerpt from the Plan, T. Br. 8 and 8 n.12, in a way which could misleadingly suggest that the Plan mandates funding of allowed claims by a Club.

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3. The Trust refers to Judge Calabresi's opinion, claiming that he "made the clear point" that this case is not the one to develop general core law. T. Br. 16. In fact, Judge Calabresi expressed disagreement with Judge Walker's basic approach (23a), concluded the matter was core but gave no reasons and took no stand as to whether to follow Judge Newman's (erroneous) "bright-line rule", a situation analysis, or something in between (24a). The "clear point" he made was one of deep uncertainty which, if anything, highlights the need for this Court's guidance.

The Bankruptcy Court's opinion includes the same misleading quotation, which could well have contributed to its error. *USL I*, 80a. The Plan's direction for the Trust to bring suit to obtain the benefits of insurance necessarily refers only to insurance under the pre-petition policies, which are independent of the Plan.[4]

The Trust quotes extensively from the Bankruptcy Court and Second Circuit opinions. T. Br. 13-16. However, these quotations are irrelevant to the core issue because, even accepting the importance of establishing rights under the pre-petition insurance contracts before paying possible claims, they give no significant reason why such rights should not be established on a non-core basis, as required under the Constitution.

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4. In fact, Plan Article VII(A)(1)(ii) provides in part:

> . . . the . . . Trustee is authorized to enter into agreements with the Clubs which provide in substance that . . . the Clubs shall make cash payments directly to the holder . . . of any Allowed Personal Injury Claim in excess of the applicable deductible for that claim (the Excess P.I. Claim). In such event [*i.e.*, only if a Club agrees] . . . the Club shall fund the portion of the Allowed Claim equal to the Allowed Excess P.I. Claim. To the extent any Club shall refuse to consent to such a program, the USL Reorganization Trustee is authorized and directed to bring suit against the Club and to take all reasonable steps to obtain the benefits of Insurance above the deductible and the reimbursement of defense costs exceeding the applicable deductible, including the making of cash payments of Allowed Excess P.I. Claims . . .

Rb56 Ex. B at 13-14.

II.

THIS PETITION PRESENTS AN OPPORTUNITY TO ESTABLISH A BRIGHT-LINE RULE RESOLVING THE CLASH BETWEEN ARBITRATION AND BANKRUPTCY

The petition, if granted, provides the Court with the opportunity to resolve a "conflict of near polar extremes," *USL IV*, 15a (citation omitted), that the Second Circuit has now decided in favor of the Bankruptcy Code. The issue should be, as suggested in *In re Dollar Corporation*, 139 B.R. 192, 197 (Bankr. E.D. Mich. 1992), "subject to Supreme Court review given the importance of international arbitration in a bankruptcy context. . . ." The Trust would have this Court defer review of *USL IV*'s abrogation of the United States' "Treaty obligations with 65 nations"[5] on the basis that the decision is "virtually *sui generis*" and an "essentially unique case [that] has little utility in articulating a general standard relating to adjudication or arbitration." T. Br. 24 and 26. It proposes, therefore, that the Pandora's box that it has opened can or has been closed. That is wishful thinking. *See Vesta Fire Insurance Corp. v. New Cap Reinsurance Corp. Ltd.*, 2000 WL 135175*5 (S.D.N.Y. 2000) (". . . when a dispute involving both the Bankruptcy Code and the [FAA] 'presents a conflict of near polar extremes' . . . it is the Bankruptcy Code that has often carried the day — even where international arbitration agreements are compromised [citing *USL IV*, 15a-17a].").

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5. *Sedco v. Petroleos Mexicanos Mexican National Oil Company*, 767 F.2d 1140, 1145 (5th Cir. 1985).

Justice Holmes stated in dissenting in *Northern Securities Co. v. United States*, 193 U.S. 197, 400-01 (1904):

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

The Trust's rhetoric of "overwhelming complexities," T. Br. 5, and the "nation-wide litigation morass," T. Br. 27, persuaded the Second Circuit that the facts before it were of "immediate overwhelming interest" and that it should therefore ignore the mandatory directions not only of the FAA but also the New York Convention and this Court's directions in respect of both. In so doing, as the Trust appears to recognize in its "*sui generis*" assertion, well settled principles governing international arbitration were overturned.

The Trust asserts that under *Shearson/American Express, Inc. v. McMahon*, ("*McMahon*"), 482 U.S. 220, 226 (1987) the FAA may be "overridden by contrary congressional command" and, under *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, ("*Mitsubishi*"), 473 U.S. 614, 639 n.21 (1983) there may be "exceptions" to the New York Convention "grounded in domestic law." T. Br. 22-23. The Trust appears to assert that 11 U.S.C. §§ 105(a) and (c),

1123(a)(5), 1142(b) and Fed. R. Bank. P. 3020(d) are the "empowering provisions" and "specific statutory sections" that satisfy the "*McMahon* standard" of "contrary congressional command." T. Br. 23.

The Trust is incorrect. Those "specific statutory sections" provide no "contrary congressional command" to the mandate of the FAA, let alone the New York Convention. Indeed, the Trust entirely ignores the Supremacy Clause, Article VI, of the Constitution and the requirement that in applying the "*McMahon* standard" to the New York Convention, as a treaty, to establish a bankruptcy exception "such purpose on the part of Congress" must be "clearly expressed." *TransWorld Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) *quoting Cook v. United States*, 288 U.S. 102, 120 (1933). The Trust's only attempt to address the complete absence of any *express* congressional override of the New York Convention is confined to its footnote asserting that the "important underlying purposes of bankruptcy law" pre-date the United States' accession to the New York Convention and, therefore, rules of construction applicable to treaties, as stated in *TransWorld*, are inapplicable. T. Br 23-24 n.24. The Trust's application of the "*McMahon* standard" fails to recognize Justice Blackmun's statement that "we decline to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not **expressly** directed the courts to do so." *Mitsubishi*, 473 U.S. at 639 n.21 (emphasis added). The Trust's further attempt to avoid the issue by again resorting to arguments of "the special circumstances and fundamental bankruptcy

precepts here present" reveals the paucity of its argument. T. Br. 28 n.26.[6]

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN D. KIMBALL
Counsel of Record
JEREMY J.O. HARWOOD
HEALY & BAILLIE, LLP
Attorneys for United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd.
29 Broadway
New York, New York 10006
(212) 943-3980

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6. The Trust's assertion that *USL IV's* conflict with *In re National Gypsum Co.*, 118 F.3d 1056, 1067 (5th Cir. 1997) is "contrived" ignores the very point made there for a discretion to deny domestic arbitration where the "underlying proceeding . . . derives exclusively from the provisions of the Bankruptcy Code. . . ." T. Br. 24-25. The Trust's averment of "fundamental bankruptcy precepts" cannot replace the nature of the "underlying proceeding" as a pre-petition contract dispute. T. Br. 24. Its distinction of the other circuit authorities said by the Clubs to be in conflict with *USL IV* as failing "to implicate any bankruptcy precept at odds with arbitration" or as pre-dating the "*McMahon* standard" is not an answer to the fact of a conflict but an unconvincing rationale for the conflict. T. Br. 25-26 n.25.

RICHARD H. BROWN, JR.
KIRLIN, CAMPBELL & KEATING
Attorneys for American Steamship Owners Mutual Protection and Indemnity Association, Inc.
Five Hanover Square
New York, New York 10004-2614
(212) 425-7800

MARSHALL P. KEATING
KIRLIN, CAMPBELL & KEATING
Attorneys for Liverpool & London Steamship Protection and Indemnity Association Ltd.
Five Hanover Square
New York, New York 10004-2614
(212) 425-7800

PATRICK J. BONNER
FREEHILL, HOGAN & MAHAR
Attorneys for West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg)
80 Pine Street
New York, New York 10005-1759
(212) 425-1900

GEORGE W. SULLIVAN
LAMBOS & JUNGE
Attorneys for Assuranceforeningen Skuld
29 Broadway
New York, New York 10004
(212) 269-0061

HELEN M. BENZIE
BIGHAM ENGLAR JONES & HOUSTON
Attorneys for The Continental Insurance Co.
40 Wall Street
New York, New York 10005-4646
(212) 269-5500